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Supreme Court, U.S.
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No. 97-542

In The

Supreme Court of the United States

October Term, 1997

THOMAS BERTRAM DIXSON,

Petitioner,

v.

ANDREA A. RUFF, Trustee,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Eleventh Circuit correctly ruled that the bankruptcy court abused its discretion by refusing to permit the Trustee to amend her complaint objecting to Dixson's discharge.

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STATEMENT OF THE CASE

Petitioner Thomas Dixson's Statement of the Case is basically accurate so far as it goes but omits much information relevant to the Eleventh Circuit's decision to permit the Trustee, Andrea A. Ruff, to amend her complaint objecting to Dixson's discharge. The Trustee's Statement of the Case corrects those omissions.

Dixson's "Move" to Florida

Dixson's Petition states conclusorily that he "moved in August of 1988 to Florida." Of course, whether or not Dixson moved from Arizona to Florida and, if so, when, is the hotly contested issue at the heart of much of this case. As detailed in the Eleventh Circuit's opinion, which is incorporated by reference, Dixson fell deeply into debt after his investment of his lottery winnings proved disastrous. Dixson's response was to undertake a fifty-state survey to see where he would have the best chance of avoiding the claims of his creditors. Dixson chose Florida and announced his change of domicile in the fall of 1988.

However, Dixson's "move" to Florida is subject to much question. After Dixson claims to have moved to Florida, he obtained an absentee ballot to vote in Arizona, maintained his Arizona driver's license, forwarded his mail to Arizona addresses, and lied under oath at depositions to actively conceal any evidence of Florida addresses from his creditors. He did not apply for a Florida driver's license, register to vote in Florida, or receive mail directly in Florida. While "moving" to Florida, he left in Arizona his two children by his ex-wife, along with his Mercedes automobile and furniture. He

also left behind at least five active bank accounts, one of which was opened after his so-called change of domicile.

Based on what she believed to be Dixson's attempt to defraud his creditors, the Trustee filed an adversary proceeding objecting to Dixson's discharge. Her complaint was based on Dixson's active fraud in concealing himself from his creditors, his attempt to convert his annuity into an asset exempt from creditors through his move to Florida, and Dixson's fraudulent claim of being a Florida resident.[1]

Circumstances Surrounding the Trustee's Amendment of the Initial Complaint

Among the allegations in the Trustee's original complaint was a claim that Dixson had knowingly and fraudulently made a false oath or false claim within the meaning of 11 U.S.C. § 727(a)(4)(A)-(B). Discovery ensued on the complaint during which the Trustee discovered numerous additional false oaths and declarations in connection with the bankruptcy. For example, in his bankruptcy schedules, Dixson stated that he had no bank accounts for the two years prior to the filing on January 11, 1989. In fact, Dixson had fifteen bank accounts – eight personal and seven business accounts. Dixson had no explanation for this omission. Dixson's bankruptcy schedules also failed to mention that in 1988 he assigned, transferred or gave away a mortgage receivable, all of his interest in an office building in Scottsdale, his interest in

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[1] The Trustee both objected to discharge and to Dixson's claim that his lottery annuity was exempt from his creditors.

a company called Sho Low Estates, and his interest in other real estate investments.

Dixson also failed to explain missing assets from his bankruptcy schedules as required. For example, on a March 1987 financial statement prepared for the purpose of obtaining a loan, Dixson had listed BPC Properties, Inc. as an asset worth $15,000. Dixson still owned this asset on the date of his bankruptcy but did not schedule it in his bankruptcy case. Dixson also lied under oath to the Trustee by denying that he ever owned stock in BPC Properties or served as a director or officer. Discovery proved that Dixson had been at meetings, signed meeting minutes, and acted as secretary for BPC Properties for years. In fact, he was vice president in 1988. Dixson also failed to schedule two limited edition prints, a gold ring, an antique desk, and a twelve-stone diamond ring, assets which Dixson had listed in the codicil to his will on March 11, 1988.

As the Eleventh Circuit noted, some of this evidence was not discovered until June and July of 1990. Dixson's most significant omission, the $15,000 interest in BPC Properties, was not discovered until the end of June 1990. Indeed, as late as June 14, 1990, Dixson was still denying in deposition that he had any interest in BPC. Many of Dixson's bank records were not discovered until the court, on July 13, 1990, compelled Dixson to produce his bank records by July 18, 1990. Two days after Dixson produced these records, the Trustee filed her eight count amended complaint. Like the first complaint, the allegations in the amended complaint concerned Dixson's false statements in connection with his bankruptcy petition,

including the false claim of residency and the assets omitted from his bankruptcy schedules.[2]

The original bankruptcy judge assigned to the case, Judge Corcoran, deferred ruling on the motion to amend the complaint pending determination of issues set for trial on July 27, 1990. The court then conducted a three day bench trial on the matters raised by the original and amended complaint. At the conclusion of the Trustee's case, Dixson moved for involuntary dismissal. Judge Corcoran stated that he would rule on the motion or continue the trial with a presentation of Dixson's case after he read deposition excerpts submitted by the Trustee as part of her case in chief. However, the court never issued a ruling on Dixson's motion or on the Trustee's motion to

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[2] Count I of the amended complaint alleges that Dixson's claim of Florida domicile for the period proceeding the filing of his petition constitutes a false oath or claim. 11 U.S.C. § 727(a)(4)(A)-(B). Count II concerns Dixson's transfer of certain property in 1988 with the intent to hinder, delay or defraud either his creditors or the Trustee. 11 U.S.C. § 727(a)(2)(A)-(B). Count III asserts that Dixson concealed bank account records and business records from which Dixson's financial condition could be ascertained. 11 U.S.C. § 727(a)(3). Count IV concerns a false oath or claim relating to the omission of certain information on Dixson's bankruptcy schedules. 11 U.S.C. § 727(a)(4)(A)-(B). Count V alleges that Dixson withheld recorded information from an officer of the estate who is entitled to such information under 11 U.S.C. § 727(a)(4)(D). Count VI complains of Dixson's failure to explain satisfactorily his loss of assets or deficiency of assets. 11 U.S.C. § 727(a)(5). Count VII incorporates the previous counts. 11 U.S.C. § 727(a)(2)-(5), (c)(1). Count VIII is alleged in the alternative and asks the court to revoke any discharge granted to Dixson on the basis of fraud. 11 U.S.C. § 727(d).

amend the complaint. Over two years later, Judge Corcoran entered an order voluntarily recusing himself from all of the Trustee's cases, including this case.

The case was then assigned to Bankruptcy Judge Proctor. On May 3, 1993, without conducting any trial and over the Trustee's objections, Judge Proctor certified that he was familiar with the record and overruled the Trustee's objections to the discharge.[3] See Petitioner's Appendix ("A.") at 30a-43a. Without explanation, the court also denied the Trustee's long-outstanding motion to amend the complaint. These orders were affirmed by the District Court for the Middle District of Florida (A. 24a-29a).

The Eleventh Circuit reversed. Applying long-settled law concerning the amendment of complaints, the court determined that the courts below had abused their discretion in denying the motion for leave to amend. Dixson's Petition for Writ of Certiorari followed.

ARGUMENT

This case is far from "certworthy." It concerns nothing more than the application of well-settled principles governing the amendment of pleadings and the "relation-back" doctrine. Dixson alleges no dispute concerning the applicable law. Instead, Dixson merely disagrees with the Eleventh Circuit's application of those principles to the unique facts at hand. Dixson's disagreements with the

[3] Judge Proctor also overruled the Trustee's objection to the exemption from creditors claim by Dixson.

Eleventh Circuit's factual analysis and conclusions are not a proper basis for certiorari review by this Court.

Standards Applicable to the Amendment of Complaints in Bankruptcy Adversary Proceedings

Bankruptcy Rule 7015 provides that Rule 15 of the Federal Rules of Civil Procedure governs the amendment of pleadings in bankruptcy adversary proceedings. The standards of Rule 15 are well familiar to this Court. Leave of court is required to amend a pleading after a responsive pleading has been filed. However, such leave "shall be freely given when justice so requires." Fed. Rule Civ. P. 15(a). Noting that the mandate of Rule 15(a) for liberal amendments "is to be heeded," *Foman v. Davis*, 371 U.S. 178, 182 (1962), this Court has observed:

> the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.

Id.

The lower federal courts uniformly apply this Court's teachings in *Foman* to enforce the liberal policy of allowing amendments under Rule 15(a). Thus, unless a substantial reason exists to deny leave to amend, the discretion of the district court is not broad enough to permit denial. *See Motor City of Jacksonville, Ltd. v. Southeast Bank*, 83 F.3d 1317, 1323 (11th Cir. 1996), *vacated on other grounds by Hess v. FDIC*, ___ U.S. ___, 117 S. Ct. 760 (1997). *See also Howey v. United States*, 481 F.2d 1187, 1190

(9th Cir. 1973) (district court's action on a motion for leave to amend should be reversed only if the action is an abuse of discretion; there is a "strong policy to permit the amendment of pleadings").

The Standards of Rule 15 Applied

The decision below that the bankruptcy court abused its discretion in denying the motion for leave to amend directly heeded this Court's admonition that the trial court necessarily abuses its discretion if it denies a motion for leave to amend without reason. The Eleventh Circuit's application of this settled law to the facts of this case provides no basis for certiorari. *See U.S. v. Johnston*, 268 U.S. 220, 227 (1925) (the Court "does not grant certiorari to review evidence and discuss specific facts.").

Here, as the Eleventh Circuit noted, the only conceivable reason for denying the motion for leave to amend was the fact that it was brought on the eve of trial. But as the Eleventh Circuit pointed out, Dixson had no one to blame but himself for that development. Discovery taken after the filing of the original complaint proved that Dixson's bankruptcy schedules were, at the very least, astoundingly incomplete and, more likely, a deliberate fraud. The Trustee did not even obtain the bank account records she sought in discovery until July 18th, only nine days before trial. Her amended complaint was filed only two days later. The Eleventh Circuit's decision to permit the amendment in light of Dixson's conduct was unremarkable: "Had Dixson been more honest in his schedules and during discovery, the motion may not have been filed one week before trial." (A. 19a). In granting the

amendment, the court simply refused to reward Dixson for his own delay. Reviewing this routine exercise of discretion would serve no useful purpose.

Dixson's Statute of Limitations Argument

Rule 4004 of the Federal Rules of Bankruptcy Procedure requires complaints objecting to discharge to be filed within sixty days of the initial date set for the meeting of creditors. Dixson argues that Rule 4004's deadline is absolute and that the Trustee's motion for leave to amend her complaint was untimely because it was filed after the sixty day period. However, Dixson acknowledges that the Circuit Courts of Appeal have uniformly permitted the filing of an amended complaint, even after the expiration of the limitations period, whenever the amended complaint "relates back" to the original pleading. *See* Petition at 9. The amended complaint "relates back" whenever the new allegations "arose out of the same conduct, transaction, or occurrence attempted to be set forth in the original pleading." Fed. Rule Civ. P. 15(c)(2).

The Eleventh Circuit's opinion acknowledged and applied this well settled precedent (A.19a-20a). As the court noted, both complaints are based on the same sections of the bankruptcy code. 11 U.S.C. §§ 727(a)(2)(A)-(B), (a)(4)(A)-(B), (D). The essence of both complaints is that Dixson attempted to defraud the Trustee and his creditors by misstating or omitting critical information from his bankruptcy schedules. In light of the information that came to light during discovery, this conclusion is not surprising. According to the court:

> In both complaints, the underlying theme is that Dixson's discharge should be denied because of extensive fraud. While some of the factual allegations in the complaints differ, as we have already stated, this difference is apparently a direct result of Dixson's unwillingness to be candid and forthcoming in filling out his petition and during the course of discovery.

(A. 20a).

Once again, there is no dispute over the law that should apply, only to its application to the particular facts of this case. Dixson's attempt to seek yet another level of appellate scrutiny should be rejected. This Court, as a court of law, does not sit to correct errors in fact-finding and "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *E.g., Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949).

Equitable Tolling

Dixson's second issue suggests that the court improperly applied equitable principles to toll the statute of limitations based on Dixson's fraudulent concealment. The court would have been well within its right to do so. Fraudulent concealment as grounds for objection to discharge tolls the limitation period fixed by Bankruptcy Rule 4004. *See Lust v. Burke*, 876 F. Supp. 1474, 1487 (D. Md. 1994); *In re Mufti*, 61 B.R. 514, 518 (Bankr. C.D. Cal. 1986). These cases merely represent the specific application in the bankruptcy context of the general rule that fraudulent concealment of a cause of action results in the equitable tolling of any federal statute of limitation in the

absence of contrary congressional intent. *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946). To hold otherwise would be to ignore the congressional intent "to provide relief for the *honest* but unfortunate debtor."[4] *Birmingham Trust Nat'l Bank v. Case*, 755 F.2d 1474, 1477 (11th Cir. 1985) (citing *Brown v. Felsen*, 442 U.S. 127, 128 (1979).

However, the court below did not reach the issue of equitable tolling. It merely observed that Dixson could claim no prejudice based on the fact that the amended complaint was filed so close to trial. Any prejudice was of Dixson's own making (A. 20a-21a). The court also observed, correctly, that the amended complaint stated a claim because the serious omissions on Dixson's bankruptcy schedules could serve as a basis for denying his discharge. *See, e.g., In re Hawley*, 51 F.3d 246, 248-49 (11th Cir. 1995). These unassailable principles need no further

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[4] The conclusion that Section 4004 is subject to equitable tolling principles is also supported by the Bankruptcy Code itself. As several courts have noted, it is possible to file a complaint to revoke a discharge based on fraud if the requesting party did not know of the fraud until after the discharge was granted. 11 U.S.C. § 727(d)(1) and (e). This complaint can be filed, even before the discharge is granted. *In re Stevens*, 107 B.R. 702 (Bankr. 9th Cir. 1989); *In re White*, 133 B.R. 206 (Bankr. S.D. Ind. 1990). As *Mufti* observed, it would defy logic to suggest that if the Trustee discovers the fraud before discharge but after the last date to object to discharge, the Trustee has no remedy. *Mufti*, 61 B.R. at 519. Dixson has cited no case to the contrary. Dixson's cases merely restate the well-settled principles for consideration of amendments of pleadings. None contain allegations of fraudulent concealment, and none discuss the issue of equitable tolling.

review or clarification from this Court. Certiorari should be denied.

CONCLUSION

This case is not "certworthy." The legal principles presented are well settled. Dixson is merely a disappointed litigant seeking yet one more level of appellate review. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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